



Submission to Office of Government Procurement Consultation on the Review of Public Works Contracts

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Key Points

- The current Government Construction Contracts Committee (GCCC) forms of contract encourage unrealistically low bids.
- Too much risk for unforeseen issues is currently placed on contractors.
- Consultation and collaboration between clients and contractors must become the norm. The current relationship is all too often adversarial.
- Transparency must become the norm at every stage of the tendering and procurement process.
- Contracts should be awarded on the basis of the 'Most Economically Advantageous Tender' rather than going to the lowest bid.
- 'Abnormally low tenders' should be discouraged or prohibited.
- SMEs must be encouraged to bid for tenders and must be given full consideration for appropriate public sector purchasing.
- Existing international construction contracts should be considered as replacements for the current system.
- A review of international best practice should be undertaken.

Introduction

Despite the well documented 'crash' in Ireland's construction sector, it remains an important part of the economy. According to Forfás, the sector has a "dual role" in that it directly provides 96,300 jobs across a number of occupations and skill levels and contributes 6.4% of GNP.¹

Therefore, construction remains a significant source of income for individuals and a considerable generator of wealth for the State.

While demand for construction projects in the private residential market remains low, there is still a need for construction in public capital programmes.

It is important that the sector returns to sustainable growth and Public Works Contracts, administered fairly and managed in a way that supports competition and responsible tendering, can be a major part of this.

To this end, public bodies must be committed to working with construction firms in a collaborative fashion at all stages of the procurement process: identification of need; selection of suppliers; and post contract award management.²

Ireland needs competent contractors who are willing and motivated to bid for public sector contracts. Balanced and fair procurement and contractual provisions will be a determining factor.

Issues surrounding procurement and tendering are becoming increasingly important in the provision of good public services and good government. It is essential that Government applies the highest standards to this process as it is effectively spending money provided by taxpayers on projects designed to benefit taxpayers.

In particular, Government must achieve value for money while not compromising on quality and service. The process must also serve the interests of business and contribute to sustainable development.

Problems with Existing Contracts

This consultation primarily deals with the Government Construction Contracts Committee (GCCC) forms of contract. Following consultation with the Chambers Ireland PA Forum and businesses throughout the Chamber Network, we have identified a number of problems with these contracts:

1. The principals behind the introduction of the GCCC contracts were to provide *Cost Certainty* and *Value for Money*; however, this was always on the proviso that contractors were to get *full and fixed information for providing a fixed price*. We believe the current system does not achieve this.
2. The current process encourages contractors to bid at levels which are so competitive that they are unrealistic. Therefore, designs are often inadequate and incomplete. Consequently, claim situations occur in respect of variations and extras.

¹ http://www.forfas.ie/media/19072013-Irelands_Construction_Sector-Publication.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62060/introduction-public-procurement.pdf; Pg 4

3. Under the contracts, inappropriate and unmanageable risks are being transferred to contractors, who can't price them properly or control them. This results in contractors frequently taking unsustainable risks.
4. For example, ground conditions, archaeology and interfaces with statutory bodies, among many other matters, have become contractors' risk items. These would be managed more effectively by public clients.
5. Many of the contract provisions are unbalanced and unfair. They favour the client and their representatives. Contract provisions are adversarial and more often lead to conflict rather than the stated collaborative aim.
6. Clients must understand their obligations and possess the project management skills necessary to manage contracts effectively. The delivery of contracts are being undermined by poor contract management which does not recognise the need to perform duties and obligations promptly and the benefits that accrue from dealing with contract issues and claims in a fair and reasonable manner.
7. At present, disputes are not being managed appropriately. They are being referred to conciliation and more often on to arbitration without reasonable consideration. This results in a waste of public money and industry resources.

Recommendations

1. The primary aim of procurement strategies should be to promote collaboration and cooperation between clients and contractors. This can lead to the establishment of integrated teams committed to efficient project delivery.
2. Contracts should be awarded on the basis of objective criteria, which ensure compliance with the principles of transparency, non-discrimination and equal treatment. Furthermore, there must be a guarantee that tenders are assessed in conditions of effective competition.
3. Value for money and lowest price are often at odds with each other. The tendering process must look for the 'most economically advantageous tender' (MEAT), which involves a consideration of price, innovation, sustainable solutions, technical merit and whole life costing.
4. To ensure compliance with the principle of equal treatment in the award of contracts, there must be an obligation to ensure transparency. This will enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied to identify the most economically advantageous tender. It should become the responsibility of contracting authorities to indicate the criteria for the award of the contract and the relative weighting given to each of those criteria in sufficient time for tenderers to be aware of them when preparing their tenders.
5. A mechanism for defining what might be considered as 'abnormally low tenders' should be agreed with the construction industry. A procedure to prohibit such bids, complying with European Directives, should be operated.
6. In accordance with the guidance set out in Circular 10/10³ and other, related documents, SMEs should be given full consideration in the competition for public

³ <http://www.procurement.ie/publications/circular-1010-facilitating-sme-participation-public-procurement>

contracts. Government must take the necessary steps to ensure the guidance in the circular is adhered to and SMEs can compete for tenders on an equal footing, in a manner which is “legal, transparent, and secures optimal value for money for the taxpayer.”⁴

7. As the “New GCCC Contracts” have little or no attaching legal precedent, Government, in consultation with industry, should consider adopting well founded, long standing, existing international construction contracts such as those provided by the International Chamber of Commerce (ICC)⁵ for use.
8. Data in respect of public contracts should be made available. Statistics and outcomes should be published annually.
9. Furthermore, as most construction projects are ‘prototypes’, there needs to be adequate provision for timely decision taking during construction and adequate and timely provision for resolving claims for variations and extras and any consequent delay and disruption claims.
10. A review of best practice procurement in other territories should be undertaken to identify options which can then be piloted in Ireland.

Conclusion

The current system is not meeting the needs of the construction sector, the business community or taxpayers.

This review is an opportunity to introduce significant and meaningful reform to ensure all parties are better served.

International best practice and international construction contracts should form the basis of further research and consultation, with the objective of producing pilot schemes that can be trialled and the ultimate aim of replacing the existing system.

⁴ http://www.procurement.ie/sites/default/files/circular_10-10_guidance_for_public_contracting_authorities.pdf: Pg 1

⁵ <http://www.iccbooks.com/Product/ProductInfo.aspx?id=488>